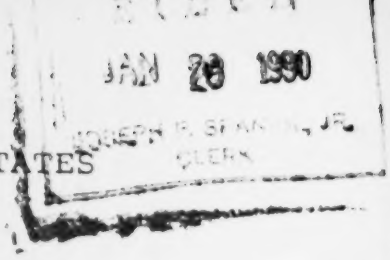
89-1605

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989



PAUL A. L. NELSON

Petitioner,

vs.

LORETTO L. JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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QUESTIONS PRESENTED

FOR REVIEW

1. Did the State of Alaska violate petitioner's Constitutional Right against self incrimination by predicating petitioner's parental right of visitation upon an admission that he had sexually abused his daughter?

2. Did the State of Alaska violate petitioner's Constitutional Right to the equal protectio of the law by predicating his visitation rights upon an admission of guilt?

3. Did the lower court violate petitioner's Constitutional Right to the equal protection of the law by requiring petitioner to pay an additional $10,000 attorney fees to respondent?

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The petitioner, PAUL A. L. NELSON, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Alaska, entered on October 27, 1989.

OPINION BELOW

On October 27, 1989, the Supreme Court of the State of Alaska affirmed a lower court's order terminating petitioner's right to supervised visitation of his daughter.

A copy of the opinion of the Supreme Court of the State of Alaska is attached and marked

"Appendix A".

JURISDICTION

The jurisdiction of this court is invoked under Title 28, United States Code, §1257(a).

No other petitioner is involved in this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United State Constitution, Amendment V:

> "Nor shall be compelled in a criminal case to be a witness against himself . . ."

United States Constitution, Amendment XIV:

> "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . ."
>
> ". . . nor deny to any person within it's jurisdiction the equal protection of the law . . ."

STATEMENT OF CASE

On January 5, 1987, the Superior Court of the State of Alaska entered a decree of divorce between the parties to this petition. The decree incorporated the parties stipulation that petitioner was to have supervised visitation with his daughter, Taiya, and required that petitioner enter counselling with Dr. Anthony M. Mander, a psychologist.

In February, 1987, Dr. Mander refused to continue counselling petitioner unless and until petitioner would admit his guilt to the alleged molestation.

In order to comply with the court order, petitioner sought counselling through another doctor, Leonard Wildeman, a psychiatrist. However, respondent denied visitation and any other forms of direct or indirect contact with petitioner's daughter.

Petitioner moved to enforce visitation rights in April, 1987, requesting that another psychiatrist be substituted for Dr. Mander. (See page 11 of the opinion below.)

After a hearing in April, 1987, the trial court found that petitioner had chosen not to comply with the conditions of visitation and treated petitioner's motion to enforce the terms of visitation as a motion to modify. The trial court also found that visitation would be harmful to Taiya and terminated visitation until petitioner would admit that he had abused his daughter. (See page 11 of the opinion below.)

After an appeal, the Supreme Court of the

State of Alaska, divided 3-2, affirmed the trial court's refusal to enforce or modify petitioner's request for visitation and that another psychiatrist be designated for petitioner's treatment.

CHIEF JUSTICE MATTHEWS, and JUSTICE RABINOWITZ dissenting, reasoned that the trial court had abused its discretion by "predicating re-establishment of parental visitation upon petitioner's admission of suxual abuse". (See page 21 of the opinion below.)

REASONS FOR GRANTING THE WRIT

A.

THIS PETITION RAISES FIRST IMPRESSION DETERMINATION OF SUBSTANTIAL CONSTITUTIONAL QUESTIONS CONCERNING PARENTAL RIGHTS.

This court does not sit to simply review and correct errors of lower courts. However, the court should accept this case because the petition raises substantial questions of first impression.

Unless this court accepts this case, state courts may continue to abuse the Constitutional Rights of many fathers.

The questions raised in this petition are described next in sub-hearings B, C, and D.

B.

DOES PREDICATING PARENTAL RIGHTS OF VISITATION UPON AN ADMISSION OF GUILT VIOLATE PETITIONER'S RIGHT AGAINST CONPULSORY SELF INCRIMINATION?

In LEFTKOWITZ v. TURLEY, 414 U.S. 70, 77, (1973), this court stated:

> "The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself.; The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings".

The State of Alaska, acting through its state courts and the court appointed pyschologist, requested that petitioner admit that he had abused his daughter. That requested admission could have been used against petitioner in future state criminal proceedings.

Although the requested admission was outside the trial context, it clearly violated petitioner's constitutional right against

compulsory self incrimination. That right previleged petitioner "not to answer official questions put to him in any other proceeding . . . formal or informal, where the answers might incriminate him in future criminal proceedings," LEFTKOWITZ v. TURLEY, supra.

The requested admission was clearly "compelled" within the meaning of the Amendment, MINNESOTA v. MURPHY, 465 U.S. 420, (1984). Petitioner was required by state action to either admit his guilt or forever give up any visitation or parental right that he had as a father.

Therefore, predicating petitioner's right to supervised visitation upon an admission of guilt, violated petitioner's right against compulsory self incrimination.

C.

DOES PREDICATING PETITIONER'S RIGHT OF VISITATION UPON AN ADMISSION OF GUILT VIOLATE PETITIONER'S RIGHT TO THE EQUAL PROTECTION OF THE LAW?

In NEW YORK CITY TRANSIT AUTHORITY v. BEAZER, 440 U.S. 568, 588, (1979), this court stated:

> The Equal Protection Clause of the Fourteenth Amendment provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' The Clause announces a fundamental principle: the State must govern impartially".

The State of Alaska did not govern impartially in this matter. The lower courts treated petitioner differently from other fathers seeking enforcement of similar visitation privileges. Predicating the application of the general laws of parental rights upon an admission of guilt violated petitioner's right to the equal protection of the law because the "general rules were being applied in an arbitrary or discriminatory way," JONES v. HELMS, 452, U.S. 412, 423, (1981).

D.

DID THE LOWER COURT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHT TO THE EQUAL PROTECTION OF THE LAW BY REQUIRING PETITIONER TO PAY AN ADDITIONAL $10,000 ATTORNEY FEES TO RESPONDENT?

At page 18 of the opinion below the majority found that the trial court had committed error by applying an improper test when awarding attorney fees. The proper test was "whether the unsuccessful party has acted

reasonably and in good faith".

However, the lower court failed to demonstrate how petitioner had failed to act reasonably or in good faith. The lower court failed to advance the reason for its ruling. It failed to apply the proper test. It failed to apply the "general rules".

By failing to apply the "general rules" the lower court failed to govern impartially, thus violating the Constitutional requirements of due process and the equal protection of the law, NEW YORK CITY TRANSIT AUTHORITY v. BEAZER, supra, and JONES v. HELMS, supra.

CONCLUSION

Petitioner has demonstrated how the actions of a lower state court violated petitioner's rights as a father and his Constitutional Rights against compulsory self incrimination and to the equal protection of the law. The questions raised by this petition are of first impression and have far reaching effects upon the rights of all parents.

THEREFORE, petitioner respectfully asks this court to accept this case in order to set authoritative guidelines for all states in this great Union.

Respectfully submitted,

DATED: 1/22/1990

Steven E. King

STEVEN E. KING
Attorney for Petitioner,
PAUL A. L. NELSON

PROOF OF SERVICE BY MAIL

CASE NUMBER: A-488

CASE NAME : PAUL A. L. NELSON v. LORETTO L. JONES

I am employed in the County of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 800 "H" Street, Suite 202, Sacramento, California 95814.

On 4/12/90, I served the within:

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

SUPREME COURT OF THE UNITED STATES
ATTN: Supreme Court Clerk
1 First Street, N.E.
Washington, D. C. 20543

SUPREME COURT OF THE STATE OF ALASKA
123 4th Street
Juneau, Alaska 99801

THOMAS W. FINELY, Esq.
119 Seward Street, Suite 1
Juneau, Alaska 99801

I declare under penalty of perjury that the foregoing is true and correct.

DATED: 4/12/90

Steven E King

STEVEN E. KING,
Attorney at Law

"APPENDIX A."

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring formal errors to the attention of the Clerk of the Appellate Court, 303 K Street, Anchorage, Alaska 99501 in order that corrections may be prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

PAUL A. L. NELSON, Appellant, v. LORETTO L. JONES, Appellee.	)	File No. S-2077 1JU-85-1188 DR
	)	O P I N I O N
	)	(No.3522 - October 27, 1989)

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Rodger W. Pegues, Judge.

Appearances: Loren Domke, Domke & Olmstead, P.C., Juneau, for appellant. Thomas W. Findley, Findley & Pallenberg, Juneau, for Appellee. Barbara T. Walker, Juneau, Guardian Ad Litem.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton and Moore, Justices.

COMPTON, Justice.
RABINOWITZ, Justice, with whom MATTHEWS, Chief Justice, joins, dissenting, in part.

This appeal arises from the divorce of Paul Nelson and Loretto Jones. In January 1987 the trial court entered a decree of divorce resolving issues of child custody, visitation, and property

division. The decree incorporated a stipulation, which provided in part: "The court finds clear and convincing evidence that Taiya was sexually abused by her father, Paul Nelson." The Stipulation conditioned Paul's right to supervised visitation on his treatment by Dr. Anthony M. Mander, a psychologist. Paul moved to set aside the decree, and his motion was denied. When Paul refused to admit in treatment to abusing his daughter, Dr. Mander terminated treatment, and Loretto denied visitation. Paul then moved to modify the court's decree as to visitation, and his motion was denied.

Paul appeals the denial of his motions to set aside and to modify the judgment. He also appeals the court's property division and award of attorney fees. We affirm.

I. STATEMENT OF FACTS

Paul Nelson and Loretto Jones were married in March 1983. Their only child, Taiya, was born in April 1983. The couple separated in May 1985, and Paul filed for divorce.

In the summer following the parties' separation, Loretto frequently left Haines to fish commercially in nearby areas. As a result,

Taiya spent most of the summer in Paul's care. Each Workday Paul left Taiya with a babysitter, Mary Benson. One morning in September, Benson was giving Taiya a bath when Taiya, without any prompting from Benson, pointed to her genital area and stated, "My daddy touched me here with his finger and he made my tummy hurt." Benson said, "What?" Taiya repeated her statement and again pointed to her genital area. At Benson's prompting, Taiya later repeated the statement to Benson's husband.

When Loretto returned from fishing a few days later, Benson did not tell her of the incident. Loretto apparently learned of the abuse from Taiya soon after. She took Taiya to Dr. Claudia Foster-Olson, who examined her. Dr. Foster observed that Taiya had an enlarged hymeneal diameter and a "gaping" vaginal orifice. These and other observations led Dr. Foster to conclude that Taiya had been subjected to repeated sxual abuse. A second physician, Dr. Dennis Batey, examined Taiya some time later and reached the same conclusion.

The trial court heard evidence on issues of child custody and property division in November 1986. In support of her request for custody,

Loretto introduced evidence that Taiya had been sexually abused by Paul.

Paul introduced the testimony of two baby-sitters, Erma Schnabel and Edith Braaten. Each testified that Taiya's vagina had been unusually large since soon after her birth.

After three days of testimony, the parties submitted a stipulation in the form of an order on the issues of custody and visitation. The parties' stipulation left the court only the valuation and division of marital property.

The stipulated order provided that "the court finds clear and convincing evidence that Taiya was sexually abused by her father." The order further provided that Paul should have supervised visitation with Taiya and required that Paul enter counselling with Dr. Mander. Asked in open court if he approved the stipulation, Paul stated, "Yes . . . with the unerstanding it's not an admission of guilt."

On January 5, 1987, the trial court entered a memorandum decision and order which incorporated the parties' stipulation on the issues of custody and visitation. The order also resolved the disputed issues of property division and attorney fees.

In an affidavit submitted in support of Paul's motion to reopen, Dr. William McIver opined that certain interviews with Taiya had been improperly conducted. Another affiant, Dr. Robert Fay, opined that hymeneal diameter measurements cannot unequivocally establish that penetration has occurred. Dr. Eugenia Gullick and Dr. Henry Adams stated that their test of Paul, involving penile plethysmographs and psychometic and clinical evaluations, revealed no evidence of an arousal pattern consistent with pedophilia. Donald Albright, Loretto's former business partner and former lover suggested in his affidavit that Loretto had fabricated the charges of abuse as a means of obtaining a favorable property settlement. Finally, other affidavits were offered to prove that Nelson's consent to the stipulation was the result of duress and ineffective assistance of counsel.

On january 20, the trial court denied Paul's motion for reconsideration, and later entered final judgment in accordance with its earlier order. On February 5, the court denied Paul's motion to set aside the stipulation and reopen evidence. Paul filed a notice of appeal.

In early February Dr. Mander terminated his treatment of Paul on the ground that he could not help Paul until Paul admitted to abusing Taiya. Loretto thereafter refused Paul visitation with Taiya. Paul moved to modify the visitation order, requesting that another psychiatrist be substituted for Dr. Mander.

In April the trial court heard additional testimony on Paul's motion. Drs. Adams and Cullick repeated their opinions. On cross-examination, each conceded that the tests performed on Paul could not establish with certainty that he had not abused his daughter. Paul conceded at the April hearing that Taiya had been abused, but denied that it was he who had abused her. He said that he had formed an opinion as to the identity of the abuser, but declined to state his opinion.

Loretto offered the testimony of Florence Wolfe. Ms. Wolfe a counsellor specializing in the treatment of sexual deviance, testified that the penile plethysmograph was susceptible to cheating. She further testified that the plethysmograph was useful in the treatment, but not in the assessment, of sexual deviance.

This court temporarily remanded the case for

consideration of Paul's motion. In September the trial court entered a memorandum and order denying Pual's motion for modification.

In December Paul moved to recuse Judge Pegues from presiding at any additional hearings in this case. Judge Pegues denied the motion. Paul appeals.

II. DISCUSSION

A. CHILD CUSTODY AND VISITATION

1. The trial court did not abuse its discretion in denying Paul's motion to reopen evidence and his motion to set aside the judgment.

On January 5, 1987, the trial court entered a memorandum decision and order based in part on the parties' stipulation. On January 8, Paul moved the court to reopen evidence, basing his motion on Alaska Civil Rule 59.[1]

When the court entered final judgment on January 23, Paul converted his motion under Civil Rule 60 to set aside the judgment.[2] In support of his motion,

---

1. Civil Rule 59 provides in part:

> A new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury or in an action

the interest of justice. On a motion for a new trial in an action tried without a jury, the court may take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

2. Civil Rule 60(b) provides in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;

(Footnote Continued)

Paul argued that (1) he had agreed to the custody stipulation under duress, (2) he had "received ineffective assistance of counsel," and (3) further expert testimony should be heard in the interest of justice.

The trial court denied Paul's motion, holding that the test results to which the experts would testify were likely in error and likely would not change the trial result. The

court disbelieved Paul's claim of duress: "the court was present for part of the drafting of the agreement, and Nelson showed no sign of duress or unusual stree."[3]

Denial of relief under Civil Rule 59 or Rule 60 will be overturned on appeal only if the new trial court has abused its discretion. Gregor v. Hodges, 612 p.2d 1008, 1010 (Alaska 1980); National Bank of Alaska v. McHugh, 416 p2d 239, 244 (Alaska 1966).

(Footnote Continued)

> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.

3. The court did not specifically address Paul's claim of "ineffective assistance of counsel." In support of his argument, Paul cited a number of criminal cases that "ineffective assistance of counsel" is a ground for setting aside a civil judgment.

4. In order to support a Rule 59 or Rule 60 motion, newly discovered evidence must be such as would probably change the result of a new trial, Cleary Diving Service v. Thomas, Head and Griesen, 688 P.2d 940, 943 (Alaska 1984). Nat'l Bank of Alaska, 416 P.2d at 244.

The court concluded that Paul had failed to

show duress. Paul asserted: "[My] attorney told me that if the court accepted Dr. Foster's testimony and there was no negotiated agreement on custody it was very likely I would not see my daughter for a year." This assertion is directly contradicted by Paul's attorney. Further, the court had an opportunity to observe Paul at the drafting of the stipulation, commenting thereon in its decision.

The court also found that "Paul's new evidence would not probably change the trial results."[4] Although Paul's stipulation was not binding on the trial court, it nonetheless constituted evidence on the issue of abuse. See McClain v. McClain, 716 P.2d 381, 385-87 (Alaska 1986); Cope v. Cope, 619 P.2d 883, 887 (Or. App. 1980), aff'd 631 P2d 781 (Or. 1981). Taken in combination with the evidence at trial, its force would be difficult to counter. The affidavits offered by Paul are not equal to the test. As the trial court remarked in discussing the penile plethysmograph, "tests often give false results, both positive and negative." Cases from other jurisdiction suggest that the court's doubts were well founded.[5] See People v. John W., 229 Cal. Rptr. 783, 785 (Cal. App. 1986) (court held

that criminal defendant had failed to establish that the plethysmograph "was a reliable means of diagnosing sexual deviance" and ruled the test inadmissible); Dutchess Cty. Dept of Social Services v. Mr. G., 534 N.Y.S.2d 64, 71 (1988) ("the results of the plethysmograph as a predicator of human behavior cannot be considered. The proof establishes that it is not only a device with, a best, questionable professional recognition, but one whose conceded margin of error is too great to reliably forecast [the child's] safety.").[6]

We conclude that the trial court did not abuse its discretion in denying Paul's motion to reopen evidence or set aside the judgment.

---

5. Referenced to legal authority from other jurisdictions is an acceptable means of considering the reliability of testing methods. See, e.g., Palukis v. State, 476 P.2d 474, 478 (Alaska 1970) (survey of legal and scientific judgments regarding polygraph tests).

6. By conincidence, Dr. Henry Adams, who testified on Paul's behalf, also testified on the father's behalf in Mr. G. Id. at 68.

2. The trial court did not abuse its discretion in denying Paul's motion to re-establish visitation.

In April 1987 Paul moved the court to re-establish supervised visitation. He argued that because he had not abused his daughter, he

could not comply with Dr. Mander's request that he admit to abusing her. Paul asked that Dr. Wildeman, a psychiatrist, be allowed to serve in the place of Dr. Mander.

The trial court found that Paul had chosen not to comply with conditions of visitation, and that his motion therefore should be treated as a motion to modify, rather than to enforce, visitation. After hearing further evidence, the trial court again concluded that Paul had abused Taiya. It also concluded, on the basis of expert testimony, that visitation would be harmful to Taiya as long as Paul continued to deny the abuse. The court denied Paul's motion.

On appeal Paul contends that the trial court abused its discretion in denying his motion. He contends that the record does not support the court's finding of abuse. He also apparently contends that even if he did abuse Taiya, supervised visitation would not be harmful to Taiya.

The trial court's decision to deny Paul's motion for modification should be reversed only if the trial court abused its discretion. Cooper v. State, 638 P.2d 174, 179 (Alaska 1981).

By conceding at the April hearing that Taiya had been abused, Paul added to the weight of evidence against him. The expert testimony of Drs. Gullick and Adams may be viewed as effectively rebutted by that of Florence Wolfe, who testified that the penile plethysmograph, though it can be helpful in treating sexual deviance, is not a reliable means of assessing sexual deviance. Thus, the court did not err in finding again that Paul had abused his daughter.

A more difficult question is whether, in light of its finding of abuse, the trial court abused its discretion in conditioning further visitation by Paul upon his admission that he abused Taiya. We cannot ignore the possibility, however remote, that Paul did not abuse his daughter. If he did not abuse his daughter, the trial court's decision places him in a difficult position: unless he admits to acts he did not commit, he will be denied visitation with his daughter.

Though the trial court's order is sever, its severity is justified by the overriding need to protect Taiya from further harm. Dr. Wileman and Ms. Wolfe each testified at the April hearing that visitation by an abuser in denial can be

harmful to the abused child. Mrs. Wolfe opined that abusive conduct can occur even during carefully supervised visits.

The trial court observe, "(p)ast experience with [Paul] shows that he will not follow the rules of supervision, that he will attempt -- using counsel when necessary -- to overcome and defeat controls placed upon him by the supervisor." During and after the divorce dispute, Paul violated the court's orders by initiating or encouraging physical contact between him and Taiya. During a visit in January 1987, a supervisor asked Paul to refrain from photographing Taiya. Paul questioned the restriction and questioned the supervisor's assumption that he was a pedohile. Later, at Paul's request, his attorney sent a letter to the supervisor. The letter demanded a scientific basis for the restriction and demanded information on the superivsor's training and education. It stated, "Mr. Nelson conclusively passed a lie detector examination . . . The polygraph results establish that Mr. Nelson did not sexually abuse his daughter.: The letter further stated: "you can be assured that Mr. Nelson will take all

steps necessary to protect his reputation."

Expert testimony and Paul's behavior both suggest that even supervised visitation could be harmful to Taiya. The trial court did not clearly err in concluding that "the risk of continuing, long lasting emotional harm to Taiya from contact with Nelson while he remains in denial is too great to be tolerated." The trial court therefore did not abuse its discretion in conditioning future visitation upon admission by Paul that he abused Taiya.[7]

3. PROPERTY DIVISION

The trial court found that the property subject to division consisted of: (1) the increase in value of Bigfoot Auto, a corportation of which Paul is a 65% shareholder; (2) money held for Taiya's benefit; (3) the fishing vessel "Small fry"; (4) fishing gear; and (5) a commercial fisheries entry permit for the drift gillnet fishery in Southeast Alaska.

The trial court awarded Loretto the Small Fry, the permit, and the fishing gear. I found that during the course of the marriage the Small Fry has increased in value by $12,500, the permit

by $6,000 and the gear by $2,500.

The trial court awarded Paul his interest in Bigfoot Auto. The court found that the increase in value of Paul's share of the business exceeded the $21,000 by which the boat, permit and gear had increased in value. The court found that Paul had received, as a result of its award, the greater part of the couple's marital property. The court found that this division was justified by (1) its treatment of attorney fees, (2) the short duration of the marriage, and (3) Paul's contribution of pre-marital assests to the marriage.

In its divorce decree, the court awarded Loretto actual attorney's fees in the amount of $28,112.53. Following the April hearing on Paul's motion for modification of visitation, the court awarded Loretto additional attorney fees.

---

7. This result finds support in Dutchess County Department of Social Services v. Mr. G., 534 N.Y.S.2d 64 (1988). In Mr. G., the court considered whether the parents' "refusal to admit, in counseling, that they committed any incestuous acts, can form the sole factual basis for a termination of their parental rights." Id. at 65. The court observed that in a number of cases "refusal to admit abuse has been a persuasive factor in restricting parental rights." Id. at 70. The court held that the need to prevent harm to the child overrode all other considerations, and it terminated the parents' rights.

1. The trial court did not err in its valuation of Paul's business.

At trial Paul's expert witness testified that the "book value" of Paul's share of Bigfoot Auto increased by $7,021.00. Loretto introduced no expert testimony on the value of the business. The trial court apparently based its valuation on the expert's testimony on cross-examination.

Paul contends the court erred in finding that his share of Bigfoot Auto increased in value during the marriage by more than $21,000. He contends that the trial court's valuation was without evidentiary basis.

A trial court's valuation of marital property is reviewed only for clear error. Moffit v. Moffit, 749 P.2d 343, 346 (Alaska 1988). A decision is clearly erroneous where this court is left with a definite and firm conviction on the entire record that a mistake has been made. Martens v. Metzer, 591 P.2d 541, 544 (Alaska 1979).

In valuing a marital asset, the court should look to the asset's fair market value. Richmond v. Richmond, ___ P.2d ___, Op. No.3500 at 8 (Alaska, Sept. 15, 1989).

Paul's expert, Mr. Kennedy, conceded that

the "book value" of a corporation bears little relation to its fair market value. Thus, his testimony on direct examination was not relevant to the issue before the court.

On cross-examination, Mr. Kennedy testified to the following facts: In 1983 gross sales for Bigfoot Auto were $245,000; in 1984, $352,652; in 1985, $450,734. Between 1983 and 1985, indebtedness on the business decreased from $141,000 to $80,000. Over the same period, the corporation spent about $57,000 on improvements to the building which houses the business. The corporation's retained earnings increased by about $55,000.

The trial court concluded that the corporation's "reduction of debt and addition of assets, including its unappropriated retained earnings," showed that Paul's equity interest in the corporation had increased by more than $21,000. This conclusion is not clearly erroneous.[8]

2. The trial court did not abuse its discretion in awarding attorney fees to Loretto.

Following trial the court awarded Loretto actual attorney fees of $28,112.53. Following the April hearing on Paul's motion for modification,

the court awarded Loretto additional attorney fees.[9] In each case the trial court based its award on the parties' relative economic situations and earning power.[10]

---

8. Paul also contends that in dividing the parties' marital assets the court improperly considered Loretto's post-separation debt. This court had held that the trial court, in dividing marital property, should consider, amoung other factors, the parties' "financial circumstances." Merrill v. Merrill, 368 P.2d 546, 547-48 n.4 (Alaska 1962). Post-separation debt is one aspect of the parties "financial circumstances." The trial court did not abuse its discretion in considering this debt.

9. Paul asserts that this second award was for actual attorney fees in excess of $10,000. Nothing in the record supports or contradicts this assertion.

10. In its initial memorandum decision and order, the court recited as an alternative basis for its award of fees Paul's "frivolous and vexatious" request for custody. In a later memorandum, the court clarified its order:

> [T]he court awarded [fees] to Jones in their entirety based on the parties "relative economic situations and earning power." The court went on to hold that full fees and costs would also be appropriate on ther grounds. It did not award them on those other grounds.

11. "This court may affirm a trial court's ruling even on different grounds from those advanced by the trial court as a basis for that ruling." Rutherford v. State, 605 P.2d 16, 21, n. 12 (Alaska 1979).

Paul contends that each of the trial court's awards of attorney fees constituted an abuse of discretion. As to the first award, Paul argues only that his request for custody was not frivolous and vexatious. Since the court's award was permised on economic disparity, his challenge is without merit.

As to the second award, Paul argues in part that the court's award unfairly burdened his pursuit of Taiya's best interests.

The trial court applied the "divorce judgment standard" to Loretto's second request for attorney fees; that is, it considered the relative economic situation of the parties rather than prevailing party status. Neither the divorce judgment standard nor the prevailing party standard is appropriate in an action to modify or enforce a visitation order. L.L.M. v. P.M., 754 P.2d 262, 264-65 (Alaska 1988). Instead the trial court should consider whether the unsuccessful party has acted reasonably and in good faith. Id. Therefore, the trial court applied the wrong standard to Loretto's request for attorney fees. Nevertheless, we uphold the court's award.[11]

Following the April hearing, the trial court found: "it remains clear, by at least clear and

convincing evidence, and in this court's view by evidence beyond a reasonable doubt, that Nelson . . . sexually abused [Taiya]." The court dismissed Paul's theories as "patently incredible," and remaked that he had "purposely withheld information . . . and given lame rationalizations for doing so." Finally, the court stated:

> Nelson, perhaps because he cannot bear the stigma of admission, decided to back out from his stipulation, to make effective treatment impossible, and to insist, nevertheless, on visitation. Since he cannot be acting in good faith or in Taiya's best interest, the court can only conclude that he is trying to salvage his reputation in his home town (Haines) at Taiya's expense.

The trial court's findings leave no doubt that Paul's motion for modification was unreasonable and in bad faith. Therefore, the trial court's award of attorney does not constitute an abuse of discretion.

C. JUDGE PEGUES DID NOT ABUSE HIS DISCRETION IN DENYING PAUL'S MOTION FOR DISQUALIFICATION.

In December 1987 Paul moved for recusal of Judge Pegues, who denied Paul's motion. Paul appeals.

In order to prevail on his motion for disqualification, Paul was required to establish that

the prior adverse rulings were the result of personal bias developed from a nonjudicial source. State v. City of Anchorage, 513 P.2d 1104, 1112 (Alaska 1973). Judge Pegues's determination that Paul had failed to meet this test should be given substantial weight, and his ruling should be reviewed only for an abuse of discretion. Amidon v. State, 604 P.2d 575, 577 (Alaska 1979).

In an affidavit submitted with his motion, Paul testified that he had observed Judge Pegues socializing with Barbara Walker, the guardian ad litem in this case. Paul argues that Judge Pegues's rulings reflect bias developed from this social meeting.

In denying Paul's motion, Judge Pegues explained that his social meeting with Ms. Walker had occurred in the presence of his wife and had not involved discussion of this case. He further noted that social meetings with guardians at litem and counsel were difficult to avoid in a community the size of Haines.

Judge Pegues's explanation is adequate. His denial of Paul's motion was not an abuse of discretion.

III. CONCLUSION

The judgments of the superior court are AFFIRMED. RABINOWITZ, Justice, with whom MATTHEWS, Chief Justice, joins dissenting in part.

I dissent from the affirmance of the superior court's denial of Paul Nelson's motion to re-establish visitation with his minor daughter Taiya. In my view the superior court abused its discretion in predicating re-establishment of parental visitation upon Paul's admission of sexual abuse. Thus I would reverse the superior court's denial of visitation and direct the entry of an order allowing closely supervised visitation with Taiya conditioned upon, and in conjunction with, continuing psychiatric and psychological treatment of Paul.

The majority notes that "[a] more difficult question is whether, in light of its findings of abuse, the trial court abused its discretion in conditioning further visitation by Paul upon his admission that he abused Taiya." Conceding that the superior court's denial order is "severe," the court nonetheless concludes that its severity is justified by "the overriding need to protect Taiya from further harm." The absence of evidence

demonstration the likelihood of harm to Taiya persuades me that the superior court abused its discretion in denying Paul visitation with his minor daughter.

Admittedly, visitation by an abuser in denial can potentially be harmful to the abused child and abusive conduct can occur even during carefully supervised visitations. On the other hand, Loretto Jones' expert witness had examined neither Paul Nelson nor Taiya, and had not reviewed the psychological records in the case. Further, Paul's expert evidence tended to show that Taiya had not experienced any harmful reactions from supervised visitations with her father.[1]

---

1. I also disagree with the court's affirmance of the superior court's award of attorney's fees against Paul in connection with its denial of Paul's motion for modification. Given my conclusion that the superior court abused its discretion in denying Paul's motion to re-establish visitation (the modification motion) it follows that Paul's motion was not made in bad faith. In the absence of bad faith on Paul's part an award of attorney's fees to Loretto Jones is not authorized. L.L.M. v. P.M., 754 P.2d 262, 264-65 (Alaska 1988).

89-1605

Supreme Court, U.S.
FILED
JUL 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

PAUL A.L. NELSON

Petitioner,

v.

LORETTO L. JONES

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

THOMAS W. FINDLEY
Attorney at Law
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Juneau, Alaska 99801
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Attorney for Respondent

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CONSTITUTIONAL AUTHORITY

United States Constitution, Amendment V:

"Nor shall be compelled in a criminal case to be a witness against himself . . ."

ALASKA RULES

Alaska Criminal Rule 45(b):

(b) Speedy Trial Time Limits. A defendant charged with a felony, a misdemeanor, or a violation shall be tried within 120 days from the time set forth in paragraph (c) of this rule.

(c) When Time Commences to Run. The time for trial shall begin running, without demand by the defendant, as follows:

(1) From the date the defendant is arrested, initially arraigned, or from the date the charge (complaint, indictment, or information) is served upon the defendant, whichever is first. . . .

Alaska Criminal Rule 45(g):

(g) Absolute Discharge. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the court upon motion of the defendant shall dismiss the charge with prejudice. Such discharge bars prosecution for the offense charged and for any other lesser included offense within the offense charged.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

Respondent LORETTO L. JONES respectfully prays that petitioner's Writ of Certiorari to review the judgment of the Supreme Court of the State of Alaska entered on October 27, 1989, be DENIED.

REASONS FOR DENYING WRIT

I.

PETITIONER'S CONSTITUTIONAL RIGHTS AGAINST COMPULSORY SELF-INCRIMINATION WERE NOT VIOLATED

Petitioner argues that admissions regarding his sexual abuse could have been used against him in future state criminal proceedings. [Petition for Writ of Certiorari, p. 5] That statement is inaccurate.

Paul Nelson was indicted by a Grand Jury for sexual abuse of T.N. on September 27, 1985. [Appendix A] The indictment alleged sexual abuse of T.N. during the summer of 1985, the same period of time and the same conduct which was alleged in the divorce proceeding. The criminal proceeding was dismissed on January 21,

1986. [Appendix B] Because petitioner was indicted and the charges were dismissed, Paul Nelson could not be indicted a second time for any sexual abuse of T.N. which occurred during the summer of 1985.

Alaska Criminal Rule 45(b) requires that a defendant be brought to trial within 120 days of the indictment. The time began to run on the day the indictment was returned. State v. Nitz, 684 P.2d 134 (AK App. 1984). Alaska Criminal Rule 45(g) requires that if a case is not completed within 120 days, the case is dismissed. Peterson v. State, 562 P.2d 1350 (Alaska 1970).

T.N. was approximately two and a-half years old when the sexual abuse occurred. No other instances of abuse were known to have occurred or were reported. Because the criminal charges were dismissed after an indictment was returned, Mr. Nelson cannot be prosecuted for this conduct again. Thus, any admissions of abuse by Paul Nelson will not subject him to criminal prosecution. Therefore, admission of

abusive conduct was not incriminating evidence which could subject Paul Nelson to criminal prosecution.

II.

TERMINATING PAUL NELSON'S VISITATION WITH HIS DAUGHTER WAS PROPER

Petitioner voluntarily entered into a stipulation admitting his sexual abuse to avoid further evidence establishing that abuse. In effect, after four days of trial, he had had enough. He stipulated to entry of the order which the judge would have entered anyway. The judge would have found that Paul Nelson sexually abused his daughter. The stipulation set forth various strict criteria for visitation with T.N., in recognition of the fact that petitioner had previously violated the conditions upon which visitation was granted.

Subsequently, petitioner denied that he had entered into the stipulation voluntarily and denied that he had abused his daughter.

With the overwhelming evidence of abuse, and a subsequent denial of the abuse, the

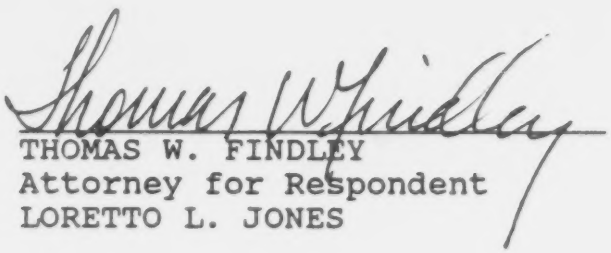
question before the court was what effect denial of the abuse would have on T.N. Expert testimony was presented, and experts for both parties testified that visitation would be harmful to T.N. The experts testified that with petitioner denying his sexual abuse, T.N. was confronted with doubt and confusion regarding her allegations, because those allegations were being refuted by her father. In effect, petitioner was saying that T.N. was lying about the abuse.

The issue is what is best for T.N., not petitioner. Expert testimony established that unless petitioner got professional help, he should not have visitation with T.N. As the expert witness cited in the Alaska Supreme Court's decision testified, since petitioner could not obtain treatment for a problem unless he admitted he had a problem, he could not get professional help. Under these circumstances the court properly ruled that it was in the best interest of T.N. that she be protected, and for those reasons visitation was terminated.

CONCLUSION

The Fifth Amendment right against self incrimination is not an issue in this case. Criminal charges brought against Mr. Nelson were dismissed in January of 1986. Trial did not occur until November of 1986, well beyond the time in which Mr. Nelson could be reindicted. Further, the ban against visitation was imposed for the protection of T.N., and it was proper to do so.

Respectfully submitted this 20th day of July, 1990.



THOMAS W. FINDLEY
Attorney for Respondent
LORETTO L. JONES

In the Superior Court of the State of Alaska
First Judicial District, Juneau, Alaska

FILED
IN OPEN COURT
Superior Court
State of Alaska
Date 9/27/85
Sharon A. Walker, Clerk
JAW, Deputy

STATE OF ALASKA,
Plaintiff

v.

PAUL A. NELSON,
DOB: 5/28/52
Defendant(s)

No. 1JA-S85-104 Cr

INDICTMENT

FOR

AS 11.41.434(a)(2)(B)
~~Violation of Sexual Abuse of a Minor in the~~
First Degree

The Grand Jury Charges:

That on or about and between May 1, 1985 through September 19, 1985 at or near Haines, in the First Judicial District, PAUL A. NELSON being 18 years of age or older, did engage in sexual penetration with T.N., a person who is under 18 years of age, to-wit: two and one-half years old and being defendant's daughter. All of which is an unclassified felony offense being contrary to AS 11.41.434(a)(2)(B) and against the peace and dignity of the State of Alaska.

DATED this 27th day of September, 1985.

A TRUE BILL,

Stephanie E. Joannides
Assistant District Attorney

Barbara Scott
Grand Jury Foreman

Witnesses before the
Grand Jury:

T.N.
Lorette Jones
Chief Boran Yankovich
Doctor Beatty

P.03

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
PAUL A. NELSON	)	
	)	
Defendant.	)	
	)	No. 1HA-S85-104 Cr.

DISMISSAL

Pursuant to Rule 43(a), Rules of Criminal Procedure, the District Attorney for the First Judicial District at Juneau, Alaska, in the interest of justice, hereby dismisses the charge of Sexual Abuse of a Minor in the Second Degree against the above named defendant without prejudice. The State, after serious consideration, reached the conclusion that the victim in this case, due to her young age, could not be qualified as a witness under the Alaska Rules of Evidence and Criminal Procedure. This dismissal does not reflect the strength or weakness of the State's case.

DATED at Juneau, Alaska this 27 day of January 1986.

HAROLD M. BROWN
ATTORNEY GENERAL

By: Stephanie E. Joannides
Assistant District Attorney

DISTRICT ATTORNEY, STATE OF ALASKA
POUCH M, JUNEAU, ALASKA 99811
PHONE 465-3600

PAUL A.L. NELSON v. LORETTO L. JONES

AFFIDAVIT OF SERVICE BY MAIL

I am the attorney of record in the foregoing matter. I am over the age of 18, and not a party to the within action. My buisness is One Sealaska Plaza, Suite 200, Juneau, Alaska 99801.

On July 20, 1990, a served the within OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA by placing a true copy theref enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Juneau, Alaska, addressed as follows:

SUPREME COURT OF THE UNITED STATES
ATTN: Supreme Court Clerk
1 First Street, N.E.
Washington, D.C. 20543

SUPREME COURT OF THE STATE OF ALASKA
P.O. Box U
Juneau, Alaska 99811

STEVEN E. KING, ESQ.
800 H Street, Suite 202
Sacramento, California 95814

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 20th day of July, 1990, at Juneau, Alaska.

Thomas W. Findley
Attorney for Respondent